(2)

Supreme Court, U.S.
FILED
AUG 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-123

In The

Supreme Court of the United States

October Term, 1988

JAMES G. P. COLLINS,

Petitioner,

v.

ASSOCIATED PATHOLOGISTS, LTD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

*HUGH J. GRAHAM, JR.
HUGH J. GRAHAM, III
GRAHAM & GRAHAM
1201 South 8th Street
Springfield, Illinois 62703
(217) 523-4569

*Counsel of Record

Attorneys for Respondent St. John's Hospital

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit correctly applied the standards for summary judgment as set forth by this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Co.*, 475 U.S. 574 and other recent U.S. Supreme Court cases.

Whether the United States Court of Appeals for the Seventh Circuit correctly applied the standards for determining the "Relevant Market" in an anti-trust claim, by concluding the "Relevant Market" to be of national scope where the challenge is of a hospital's contract for delivery of pathology services.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF CASE	2
REASONS FOR DENYING THE PETITION	10
CONCLUSION	25

TABLE OF AUTHORITIES

Page

Anderson v. Liberty Lobby, Inc., (1986), 477 U.S. 242, 91 L.Ed.2d 202 ..... 13, 14, 21

Collins v. St. John's, et al., 676 F.Supp. 1388 (C.D.-Ill. 1987), 844 F.2d 473 (7th Cir.-1988) 1

Hyde v. Jefferson Parish Hospital, (1984), 466 U.S. 2, 80 L.Ed.2d 2 ..... 11, 15, 16, 17, 18, 24, 25

Marrese v. American Academy of Orthopedic Surgeons, (7th Cir.-1983), 706 F.2d 1488, p. 1495 18

Matsushita Electric Industrial v. Zenith Radio, (1986), 475 U.S. 574, 89 L.Ed.2d 538, at p. 553 ..... 12, 19

Monsanto Co. v. Spray Rite Service Corporation, (1984), 465 U.S. 752, 79 L.Ed.2d 775 19

Northern Pacific v. U.S., 356 U.S. 1, at 5, 2 L.Ed. 2d 545 10

Tampa Electric v. Nashville Co., (1961), 365 U.S. 320, 5 L.Ed.2d 580 ..... 17, 18, 24, 25

U.S. Trotting Assn. v. Chicago Down Association, (7th Cir.-1985), 665 F.2d 781 18

No. 88-123

In The
Supreme Court of the United States
October Term, 1988

JAMES G. P. COLLINS,

Petitioner,

v.

ASSOCIATED PATHOLOGISTS, LTD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

Respondent, St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis, on behalf of themselves and all others similarly situated ("Defendants"), respectfully oppose the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in above- captioned cause on April 20, 1988.

OPINIONS BELOW

The Central District Court of Illinois' order of summary judgment is reported at 676 F.Supp. 1388 (C.D. Ill. 1987). The Seventh Circuit Court of Appeals' opinion affirming this order of summary judgment is reported at 844 F.2d 473 (7th Cir. 1988). In addition, both opinions are reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

See Petition for Writ of Certiorari, at page 2.

PROVISIONS OF STATUTES AND RULES INVOLVED

See Petition for Writ of Certiorari, at pages 2-3.

STATEMENT OF THE CASE

This case involves the claim of a pathologist, James G. P. Collins, an ex-employee and prior shareholder of Associated Pathologists, Ltd. (A.P.L.), that the exclusive contract which his ex-employer, A.P.L., had with St. John's Hospital (St. John's), an Illinois not-for-profit corporation, for the delivery of pathology services to its patients at its Hospital was in violation of Sections 1 and 2 of the

Sherman Anti-Trust Act and additionally that he was wrongly deprived of his staff privileges at St. John's Hospital.

The motions for summary judgment filed by St. John's Hospital and A.P.L. were granted by the District Court and affirmed by the Seventh Circuit Court of Appeals.

St. John's Hospital is a large, not-for-profit hospital, some 750 beds, owned and operated under the auspices of the Hospital Sisters of the Third Order of St. Francis.

It has a significant primary and tertiary care patient load, with its primary care patients coming from the surrounding counties, its tertiary care services drawing patients from some 20 nearby counties. It has specialties in obstetrics, high risk neonatal services, pediatrics, trauma, and cardiology and cardiac surgery.

Its counterparts in Springfield are Memorial Medical Center with some 600 beds with primary and tertiary services as well, though of somewhat different emphasis and Humana Hospital, a 150 bed primary care facility. Southern Illinois University has a medical school with its interns and residents at both St. John's and Memorial.

Associated Pathologists, Ltd. is a corporation which has contracted with St. John's Hospital to provide all pathology services to that hospital. It does this presently through a written contract dated October, 1983, and has done so under various contracts since 1970. There are some 6 shareholders and employees of A.P.L., all pathologists.

The written contract may be terminated by 90 days written notice without cause by either party.

There is considerable work regarding pathology in a hospital of this size. The pathologist's role is generally classified as either "anatomical" or "clinical".

The "anatomical" pathologist's function is the taking, examining and analyzing specimens, body tissue or fluids, removed in the course of a surgical procedure.

The "clinical" pathologist's work is more administrative. There are 3 to 4 pathologists of A.P.L. who do the clinical work here at St. John's. They oversee the 140 full time employees of the laboratory, who operate in any of 7 different sections—Hematology, Chemistry, Special Chemistry, Immunology, R.I.A. Requisitioning, Transfusion Services and Microbiology. These employees do everything from the collecting of the samples from the patient on the floor, delivery to the laboratory, running the tests of the sample and publishing the results, and remitting that information back to the patients record on the floor, to the checking of the machinery to verify the correctness of its results. Some 600 specimens are obtained daily, with 2,000,000 tests done annually.

The other work of pathology—"anatomical"—is performed by 2 to 3 pathologists. They process tissue and fluid specimens obtained, some 22,000 annually, in any of the 22 surgical suites there in the hospital and write written opinions regarding those findings for the treating physicians' followup.

James G. P. Collins came to A.P.L. in early 1970 and left A.P.L. in January, 1982.

Ted Druhot, the administrator of St. John's Hospital, first learned of any difficulty with Collins when

Dr. Nickey, the originator of A.P.L., advised Druhot that Collins would be leaving and he, Collins, was not carrying his share of the work. Shortly thereafter, Collins contacted Druhot saying he would consider an "independent relationship" with the Hospital. Mr. Druhot said he would consider it, spoke with his assistant administrator about it, and concluded there could not be harmony in the laboratory with both Collins and A.P.L. and advised Collins accordingly.

Druhot asked Collins to consider doing the laboratory work for the entire hospital, which Collins declined to do.

Collins never spoke with Druhot again on the subject. Collins left for California in January, 1982, and asked the hospital to place him on leave of absence, which as of 1985, was still his status at St. John's.

Dr. Collins did not make a request for any type of hearing before the head of the department, administrator of the hospital, or Board of Directors regarding any dispute he had with A.P.L., any issue of his staff privileges, or reduction of his privileges or the refusal to employ him or proposal to furnish laboratory services for the entire hospital.

St. John's Hospital has contracted with a corporation, here, A.P.L., for the latter to provide the entire scope of pathology services for several reasons:

(1) To assure 24 hour coverage for pathology services;

(2) To improve hospital control over quality and cost of professional services;

(3) To improve recruitment of physician pathologists;

(4) To assign responsibility for the entire operation to one party; and

(5) To improve patient care.

Mr. Druhot felt this was the best type of arrangement for St. John's at that time.

Humana Hospital only uses this type of contract for pathology at its some 100 hospitals. (Collins is employed as the pathologist at Humana Hospital in San Leandro, California under a contract like A.P.L. has with St. John's.)

Dr. Kenneth Earle, a board certified pathologist and head of medical affairs at Our Lady of Lourdes Hospital in Lafayette, Louisiana, a 400 bed hospital, stated in his deposition he uses this type of contract for pathology, radiology and emergency services.

Mr. Laabs, Administrator of St. John's Hospital now, states in obtaining his M.B.A. degree, he found this arrangement—exclusive contract—the most prevalent in the New York City Hospitals he was writing about in one of his thesis papers.

A.P.M. Incorporated, a management consultant firm, did a strategic market plan for St. John's in 1982. It felt that St. John's Hospital is one of the most clinically sophisticated hospitals in the country on such "ancillary services like radiology and laboratory."

The American Hospital Association has a number of publications dealing with various statistical factors and hospitals and in its "Monitrend" report, a quarterly, it is

noted that on some ratios, St. John's is better than the national average; in some instances, the same or less than the national average, but never less than in the 3rd quantile and when compared to the neighboring Memorial Medical Center, St. John's does well in these ratios of numbers and costs of procedures, laboratory labor costs per procedure as compared to total procedure cost, professional laboratory cost as compared to total procedure cost and like statistics.

St. John's contract with A.P.L. in the early 1970's provided for compensation as a percentage of gross laboratory charges. In 1975, the contract was changed to provide for payment at a fixed rate for each procedure based upon a New York relative value scale. This is essentially the method used today, though based upon different factors and the Medicare guidelines. The change in 1975 was to reduce patient costs; i.e. to make certain that laboratory prices tracked with laboratory expenses and not general hospital expenses which were increasing rapidly because of labor increases at that time, and likewise the recognition that since the laboratory process was becoming so machine oriented, with the ever increasing use of machines to test the samples and give the results, labor was no longer the principal element in the laboratory process.

The method of charging for laboratory services and rate of charge is in conformity with Medicare guidelines and those other third party payor requisites.

There is no indication in this record that the charge for any particular test or series of tests is excessive or otherwise inappropriate.

The charges for the work done in the laboratory in the years prior to 1983 was included in the patients' bill for other hospital services; those laboratory charges included a "component" reflective of the hospital costs, i.e. labor, equipment and supplies. It also included a "professional component" which was the pathologists' compensation based upon the percentage of gross charge prior to 1975 and since then on a "unit value" scale.

Since 1983, however, the pathologist charges for the pathology work have been divided between the ''clinical'' component, and the ''anatomical'' component. The charge relative to the pathologists work in connection with the overview of the equipment and the 140 laboratory employees, i.e. the "clinical component", is included as a part of the hospital charge for those pathology services and like other specific hospital charges—surgical suite, surgical supplies, anesthesia or whatever, Medicare reimburses for that if this is a reasonable cost. On the other hand, the other feature, i.e. ''anatomical'' work, (where the pathologist is doing the evaluation of a specimen removed from the body in the course of surgery) is separately charged for and separately billed for (like any other physician bills), though the Hospital bills for it, because of the A.P.L. request that the hospital do it.

The Hospital monitors the pathologists' ''anatomical'' charges to insure that these surgical pathology charges do not exceed the 75th percentile of the Medicare profile of the ''prevailing'' charge for that work.

Dr. Collins had practiced pathology in New York, in Springfield from the early 1970's until 1982, then in California. Dr. Nickey and Dr. Van Fossan, both sharehold-

ers and employees of A.P.L. since 1970, were from Texas. Dr. Kenneth Earle had earlier practiced pathology in Texas and Washington, D.C. before coming to Louisiana.

Dr. Collins, when speaking with Druhot in 1982, indicated that there were some 200 pathologists presently seeking employment through the College of American Pathologists.

Dr. Collins made no effort to see if there were a pathology position open at Memorial Hospital or Humana Hospital in Springfield.

Dr. Collins, himself a practicing pathologist, had never had a patient request his services. The Humana representative, in her deposition, stated that she in over 30 years of employment had never heard of a patient choosing a hospital on the basis of the pathology department. Physicians rarely request specific pathologists. Generally, pathology is a hospital based specialty, where the patient has little or no contact with the pathologist; the pathologist's principal interaction is with the pathology department employees and overview of the equipment in that department.

As is noted from the deposition of Dr. George Andrews, an anesthesiologist at St. John's Hospital, anesthesiology is a differently oriented practice—patient oriented; he has some 3-4 surgical patients per day and preoperative examinations for 3 to 4 patients to have surgery the following day and 3 to 4 post surgical follow-ups.

———o———

REASONS AND ARGUMENT FOR DENYING THE WRIT

I.

SUMMARY JUDGMENT IS APPROPRIATE, WHEN THE RECORD TAKEN AS A WHOLE COULD NOT LEAD A RATIONAL TRIER OF FACT TO FIND FOR THE NONMOVING PARTY AS "THERE IS NO GENUINE ISSUE FOR TRIAL"; AND THIS CONCLUSION WAS REQUIRED UNDER THE EVIDENCE IN THIS RECORD.

There are essentially three claims against this St. John's Hospital; that the arrangement for delivery of pathology services was a "per se" violation of Section 1 of the Sherman Act, as a "tying" arrangement or a "boycott." Secondly this arrangement, an exclusive dealing agreement, was an unreasonable restraint of trade and thus, a violation of Section 1. Finally, the physician's staff privileges were wrongfully eliminated or reduced in violation of the hospital bylaws.

We repeat the claims made, because it is against this background that the claim of the pathologist that the motion for summary judgment was improvidently granted, must be examined.

The argument that the arrangement was a "per se" violation of the Act, as a "tying arrangement, means that the arrangement is essentially without any redeeming social value.

This Court in *Northern Pacific v. U.S.*, 356 U.S. 1, at 5, 2 L.Ed.2d 545 stated the rationale for the "tying" and "per se" rule:

> "However, there are certain agreements or practices which because of their pernicious effect on competi-

> tion and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

The assertion is made, likewise, that the arrangement could be classified as a "boycott," and that "boycotts," like "tying" arrangements, are "per se" violations.

When one recalls the purpose of declaring a "tying" arrangement or "boycott" as unlawful per se—because it is so contrary to our accepted business practices, it is clear that the purpose of and the effect of this arrangement for the delivery of pathology services in a hospital, simply does not fit that type of dreaded and despised arrangement.

In this record there is a complete absence of any "pernicious" effect of this arrangement upon competition and more importantly, there is positive evidence of the benefit of this arrangement to obtain high quality test results, with 24 hour round the clock coverage, with backup as needed, at a reasonable cost to the patient.

To be successful on the alternate claim of Section 1, Sherman Act violation, (assuming no "per se" violation), the pathologist has the burden of proving that this arrangement has "unreasonably restrained competition". *Jefferson Parish Hospital v. Hyde,* 466 U.S. 2, at 29, 80 L.Ed.2d 2.

This then is the setting in which the grant of the motion for summary judgment is to be judged.

Appellant is critical of this Seventh Circuit consideration of the principles regarding motions for summary judgment. We disagree.

The appellant states that *Matsushita Electric Industrial v. Zenith Radio,* 475 U.S. 574, 89 L.Ed.2d 538, at p. 553, states that in evaluating a summary judgment:

> "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion."

This language, however, must be read in view of the sentence that followed at p. 553:

> "But Anti-Trust Law limits the range of permissible inferences from ambiguous evidence in a Section 1 case. Thus in *Monsanto Co. v. Spray Rite Service Corporation* (citation), we held that conduct as consistent with permissible competition, as with illegal conspiracy does not standing alone support an inference of anti-trust conspiracy (citation). To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of Section 1 must present evidence 'that tends to exclude the possibility that the alleged conspirators acted independently.' (Citation). Respondent in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action . . ."

Note also this Court's language at p. 552:

> "Second, the issue of fact must be 'genuine.' Fed. Rule Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. (Citation).
>
> In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' Fed. Rule Civ. Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed. Rule Civ. Proc. 56(e), 28 USC App., p. 626 [USCS Court Rules,

> Fed. Rules of Civ. Proc., Note following Rule 56] (purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial'). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" (citation).

The appellant seems critical of the Seventh Circuit because the Seventh Circuit stated that *Matsushita's* emphasis that there must be a genuine issue for trial, "indicates that a summary judgment motion is like a trial motion for a directed verdict, and that 'genuine' allows some quantitative determination of the sufficiency of the evidence," p. 5, 844 F.2d 476.

However, this Court in *Jack Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 91 L.Ed.2d 202, p. 214 (1986) states:

> "And we have noted that the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard: 'The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.'" *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 745, n. 11, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983).

The Court at p. 214 uses these words:

> "In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

and at p. 213:

> "The petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Brady v. Southern R. Co.*, 320 U.S. 476, 479-480, 88 L.Ed. 239, 64 S.Ct. 232 (1943).

and at p. 213, quoting from *Improvement Co. v. Munson*, 14 Wall. 442 at 448:

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (Footnotes omitted).

The only conclusion to be drawn from all of this is that a motion for summary judgment will be granted in some instances, even though there is a "factual" dispute. It will be granted in those instances where, notwithstanding the factual dispute, the evaluation of the evidence as a whole "is so one-sided that one party must prevail as a matter of law." *Jack Anderson v. Liberty Lobby*, supra, p. 214.

This then is the background for determining the propriety of this district court's grant of the motion for summary judgment, where the claim is that the arrangement for the delivery of pathology services at that hospital is "pernicious" and without any redeeming social value.

We respectfully state that the District Court and Court of Appeals were absolutely correct in their assessment of the applicable principles and their judgment, that, as a matter of law, on the evidence in this record, no verdict for plaintiff could ever stand on this claim.

More to the particulars of this claim, plaintiff states that there is an unlawful "tying" of two distinct products or services in two distinct markets—that pathology services in the hospital are separate and distinct from hospital services.

In *Hyde v. Jefferson Parish Hospital*, 466 U.S. 2, 80 L.Ed.2d 2, this Court has specifically recognized that with some hospital based physicians, their work is part and parcel of the hospital in general—referring specifically to pathology. *Hyde* Footnote 36 at p. 19, 80 L.Ed.2d 2. Your Court noted that while there may be a service of anesthesiology, separate from the hospital services generally, since the anesthesiologist's work is personal and patient oriented, that was unlike other hospital based specialties like pathology.

In addition to what is noted there, the evidence in this record shows plaintiff, himself a pathologist, board certified for 17 years, has yet to have a patient request his services. In addition, physicians rarely ask for a consult from a specific pathologist—the pathologist rarely has any "patient contact"; the work is largely administrative,

overseeing various laboratory technicians and machines and establishing quality control procedures and monitoring laboratory results.

Thus, while there are *claims* that there is a separate and distinct, discreet product, or service of pathology, separate from other hospital services, there is a total absence of evidence in that regard.

We submit that the Appeals Court characterization of the evidence as "overwhelming", that there are no two distinct products—"pathology", as distinct from hospital services, is accurate.

Likewise, just as in *Hyde,* supra, 466 U.S. 2 at 26-28, there is no evidence of any "forcing" of a patient to purchase the separate and distinct, or discreet "tyed" product or service, the patient did not otherwise need or want, there is a total absence of evidence of "forcing" in this record. In that regard, note that it is the attending physician or consulting physician, and not the hospital employee, or the pathologist, who is ordering the laboratory work for a given patient.

Apart from the "tying"—"per se" violation—the claim is made that the "arrangement" is violative of Section 1 under a Rule of Reason analysis, because it is an "exclusive dealing" arrangement which operates as an unreasonable restraint upon competition.

First, it is noted that all agreements result in some restraint of trade or competition and secondly, not all exclusive contracts violate the Sherman Act.

In *Hyde,* supra, 466 U.S. 2 at 29, 31-32, after finding that the anesthesiology arrangement was not a "tying" ar-

rangement and not a "per se" violation of the Sherman Act, the Court remanded the matter for further consideration on the issue of whether or not it was an unreasonable restraint upon competition, an issue on which the plaintiff would have the burden of proof of its "unreasonableness".

The Court also suggested that a proper analysis of the unlawfulness required a determination of the market in which the forces operated (i.e. competition among anesthesiologists), to see what effect the Roux type contract had in that market and thus to determine, if the effects obtained were or were not unreasonable.

Drawing on *Hyde* then, the District Court and the Appeals Court here felt that the competition to be considered was that among pathologists; it found that the market in which the pathologists competed was nationwide. Both of those courts noted that plaintiff himself practiced first in New York City, then Springfield, Illinois, then in San Leandro, California. Several other pathologists of A.P.L. practiced first in Texas, then in Springfield. Plaintiff, when talking with the administrator of St. John's Hospital, observed that in the College of American Pathology there were some 200 pathologists seeking employment nationwide.

This market analysis was undertaken as well in view of the *Tampa Electric v. Nashville Co.*, 365 U.S. 320, 5 L.Ed.2d 580. There the market was those coal producers, within a 7 state area, who were competing for the opportunity to deliver coal to Tampa Electric, the electric utility, under a 20 year supply contract with a cost in excess of $100,000,000 over the life of the contract.

We submit that the only evidence on this issue in this record shows unmistakably that the relevant market is national, which is required as a fair reading of *Hyde* and *Tampa Electric.*

Further then, on the basis of *Tampa Electric,* the district court and the appeals court found that the pathologists leaving this St. John's Hospital would have no impact on that national market.

The District Court considered the claim of "boycott" first as a "per se" violation and then as one to be analyzed under the Rule of Reason principles. Each court noted that in earlier years, the "boycott" may have received the "per se" labeling, though in recent times the cases have spoken of "boycott", whenever the action under examination had some redeeming value, in terms of the Rule of Reason analysis. *U.S. Trotting Assn. v. Chicago Down Association,* 665 F.2d 781 (1985 - 7th Cir.) and *Marrese v. American Academy of Orthopedic Surgeons,* 706 F.2d 1488, p. 1495 (1983 - 7th Cir.). We submit that this is a correct perception.

The "boycott" claim is bottomed on the idea that St. John's Hospital and the other A.P.L. pathologists agreed to exclude Collins from practice.

There is no testimony that there was any such agreement to "boycott" Dr. Collins.

There was testimony, however, that both an A.P.L. director and Dr. Collins spoke with the St. John's Hospital administrator, Druhot, about the situation and Druhot determined he did not wish to employ Dr. Collins at that time.

We submit that under the *Monsanto Company v. Spray Rite Service Corporation*, 465 U.S. 752 (1984) and *Matsushita Electric Ind. v. Zenith Radio*, 475 U.S. 574 (1986) where the evidence is consonant, as well with a *lawful* purpose, as with an *unlawful* purpose, that information alone cannot be the basis for summary judgment condemning the actions or statements.

We have exactly the situation here, where there is constant need for this hospital to talk to all of these parties each in furtherance of lawful contract aims. Consequently, because there is this regular exchange going on, this Court has stated, as a matter of policy, that lawful exchange of ideas, arguably which are in furtherance of the lawful purposes of the Sherman Act must be protected, because to do otherwise would stifle competition, the very thing the Act was designed to promote. Thus, if the evidence can have either construction (lawful or unlawful) equally well, the activity must be allowed to continue; and it is only when the activity can be demonstrated to be wrong, quite independent of the equivocal evidence under consideration, that the activity should be condemned as a violation of Section 1. *Monsanto*, supra and *Matsushita*, supra. This evidence of these conversations has both these lawful and unlawful constructions. Because it lends itself to either construction, and because this is the only evidence on this issue, the motion for summary judgment here was properly granted.

The final claim is that Collins' staff privileges were wrongfully curtailed, or eliminated in spite of procedures for handling under the hospital bylaws.

Dr. Collins spoke once with the hospital administrator about "an independent relationship" with the hospital. The administrator said he would consider it; which he did. He decided against it and suggested alternatively that Dr. Collins consider a proposal to perform all pathology work for the hospital, which Collins declined to do.

Dr. Collins, at his request, was placed on leave of absence—the status he holds as of 2 years ago.

No hearing was ever requested by Dr. Collins, on this issue or any other issue regarding his A.P.L. or hospital status, and none took place.

The District Court and Appeals Court both found that there was no hearing requested, found that Collins' staff privileges had not been reduced or revoked and granted this hospital's motion for summary judgment accordingly.

The plaintiff's expert had several conclusions on the inappropriateness of the exclusive agreement for pathology services, the divisibility of pathology services from hospital services, cost effectiveness of a different pathology arrangement, and the like, which are either not relevant to the issues, or are directly contradicted by other evidence in the record coming from witnesses having no interest in this litigation, or contrary to the observations and experiences of the ordinary person from life.

That being true, the District and Appellate Court were correct with regard to the grant of the motion for summary judgement—in that there was no "genuine issue for trial", since there was not "sufficient evidence favoring the nonmoving party for a jury to return a verdict

for that party," *Jack Anderson v. Liberty Lobby, Inc.*, supra p. 212, 91 L.Ed.2d.

The plaintiff makes a number of other assertions dealing with its claims that the arrangement was a "per se" violation or alternately, violative of the "Rule of Reason" analysis required by Section 1, i.e. there was a shortage of anatomical pathologists, delays in the provision of pathology services, use of antiquated equipment, inappropriate rate structure for inpatient and outpatient services, and charging at physicians rate for technicians work.

The district court had extensive documentation through the discovery process, of the workings of this St. John's Hospital in this delivery of pathology services.

The principal thesis of the district court in rejecting the "per se" claim of "tying" was there were no separate and distinct markets for pathology services, as distinct from other hospital services.

In considering that claim, and the other claims of "boycott" and "exclusive dealing" where the assertion was the arrangement violated the Rule of Reason principles of Section 1, the Court considered the other evidence elicited by plaintiff above.

And in that search, each court concluded that the "market area" in which the competition was to be measured, was "national" and different than that claimed by plaintiff. Moreover, it found no evidence of any anti-competitive effect and, thus found contrary to plaintiff.

Even if you assume the above courts were incorrect on all of these ideas, we suggest that the facts in this case still leave one to conclude that there is no "genuine issue

for trial'' since there is no justification for the jury to determine that this arrangement is an unreasonable restraint upon competition.

The testimony rather is that the arrangement affords a lower price for the consumer product, demands accountability of one party for all pathologists' services, assures continuity of service and round the clock coverage and improves quality of care for the patient.

As to the specifics ot the claims of plaintiff, the evidence in this record does not demonstrate that there is any credence, to a claim of a delay in the delivery of pathology services, nor that any assumed delay is attributable to the fact that this hospital has this type of contract for pathology services. As to the claim the equipment is antiquated, the testimony is that there has been continual reinvestment of funds over the years in acquiring new analyzing equipment and in the computerization of the laboratory. The claim is made that it is inappropriate to charge differently for inpatient, as against outpatient laboratory work; the response is that obviously the hospital has less work to do for outpatient work, in that its employees do not obtain the specimen, nor label it or deliver it to the laboratory for processing and thus less cost.

The claim is made that hospital is charging the patient for work done by technicians at physicians' rates. The evidence rather is that the bulk of the work done by pathologists is ''clinical'' or ''administrative''. This is the overseeing of the employees in the Chemistry, Blood or other sections. The technicians give to the pathologist test results, when the results seem beyond the norm for

the pathologists' input and judgment. The pathologists write the procedures for the taking of samples and the maintenance and verification of the various machine procedures being done. The compensation of the pathologist for this work as was noted earlier, since 1983 has been based upon an assumed work load format, instituted by the Hospital in compliance with the Medicare regulations of 1983 and like protocol of the other medical insurance providers. Thus, the patients' bill for pathology work includes an arbitrary component for this pathologist physician's input determined from these principles and based upon cost accounting principles. This methodology is not something contrived by this hospital. It is this procedure for billing which makes plaintiff state that the patient is being charged at physician's rates for the technician's efforts.

We respectfully submit, then, as we feel was felt by the District Court and the Court of Appeals, that there is no "genuine issue for trial" in this record as to the propriety of this arrangement for the delivery of pathology services regardless of how one defines the Market Area or attempts to measure the impact upon that Market Area, since there is no unreasonable restraint upon competition as envisaged under the Rule of Reason.

To conclude, this respondent submits that the Appeals Court correctly defined the standard to be used in determining the appropriateness of a Summary Judgment and the evidence is consonant with that grant of the summary judgment motion, as based upon an examination of the record as a whole, there is no "genuine issue for trial". Consequently, there is no reason to grant the petition for writ of certiorari.

II.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE MARKET AREA WHICH IS THE SUBJECT OF INQUIRY UNDER A SHERMAN ACT CLAIM, REGARDING ANTI-COMPETITIVE EFFECTS OF A CONTRACT OR PATHOLOGY SERVICES IS NATIONAL IN SCOPE, AND CORRECTLY FOUND FROM THE ONLY EVIDENCE IN THIS RECORD THAT THAT MARKET IS, INDEED, NATIONAL.

We have dealt earlier with the facts regarding definition of market area, since it seems intertwined with the treatment of the question of the appropriateness of the summary judgment grant.

We would repeat, however, that *Tampa Electric,* supra, indicates that the scope of the inquiry may be over a number of states and may focus upon a different set of players than might be considered at first glance. In *Tampa Electric* the competition being measured was amongst the suppliers of coal, the mining companies from the several surrounding states; it was not the retail consuming public.

In *Hyde,* supra at p. 23, the competition to be concerned with was amongst anesthesiologists and the effect that the exclusive contract had on competition among anesthesiologists; that Court remarked the inquiry may be statewide or merely local.

The only evidence in this record is that plaintiff has practiced in New York, Illinois and California; that several of plaintiff's ex-employees have practiced in Texas and Illinois; that one other pathologist who testified has practiced in Texas, Washington and Louisiana; that plaintiff himself suggests the market is national when he states

some 200 pathologists are advertising for placement in their Board Publications.

That the market is national is further corroborated by the fact that the practice is not patient oriented, rather administrative or research oriented, and thus less of a likelihood to find a "patient base" requiring the physician to remain in one locale to maintain a livelihood.

We submit that given the instructions of this Court in *Tampa Electric* and *Hyde* to determine the market area in which the competitive forces operate and the only evidence in this record as indicated above, the District Court and Appeals Court were correct in their assessment that the market was national and the entry of summary judgment was appropriate accordingly.

Consequently, the petition for writ of certiorari should be denied since the principle enunciated here is not at odds with other decisions of this Court. Moreover, it is dictated by the only evidence in this record on this issue.

CONCLUSION

The Petition for Writ of Certiorari should be denied since the Court of Appeals for the Seventh Circuit correctly stated the principles applicable with reference to a Sherman Act Anti-Trust claim in view of *Hyde v. Jefferson Parish Hospital* and the propriety of the grant of a Motion for Summary Judgment, and the evidence here dictated summary judgment as the evidence is "so one-sided that one party (Respondents) must prevail as a matter of law."

Respectfully submitted,

HUGH J. GRAHAM, JR.
HUGH J. GRAHAM, III